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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORMAN R. JOHNSON AND LOUISE C. JOHNSON, *et al.*,
Petitioner,

v.

PACIFIC LIGHTING LAND COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May a grower's agent acting as a fiduciary under the Federal Perishable Agricultural Commodities Act and the law of agency be required to disgorge its profits because it has deliberately violated its trust at the expense of its principals.

LIST OF PARTIES

The Plaintiffs in this action are:

Norman R. Johnson and Louise C. Johnson, Freeman L. Vacher and Hilma I. Vacher, Fred W. Kamrath and Vera M. Kamrath, Gerada El Lipfel, D. Clark Conder and Rhea G. Conder, Russell S. Braman and Mae O. Braman, William Ford Montgomery and Nellie Mae Montgomery, Ella M. Gerlinger, Albert M. Cann and Mary E. Cann, and Crew Development Co., Inc., a California corporation, as representatives of citrus growers contracting with Blue Goose Growers, Inc., dba Yuma Citrus Co. during 1973-1978.

The Defendant in this action is:

Blue Goose Growers, Inc., dba Yuma Citrus Co. and Clark Packers Co.; a wholly-owned subsidiary of Pacific Lighting Corporation, a California public utility.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The named representative Plaintiffs request that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 817 F.2d 601 (1987). (Appendix A)

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 18, 1987. (Appendix B) A timely Petition for Rehearing was denied on August 21, 1987. (Appendix C) The mandate was issued on September 1, 1987.

This Petition is filed within the time permitted by 28 U.S.C. Section 2101(c). This Court's jurisdiction arises from 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499(a)-499(s) (Appendix D), its implementing regulations, 7 CFR §§ 46.1-45.45 (Appendix E), and Chapter 1, Division 20 of the California Agricultural Code, §§ 54001-54294. (Appendix F)

STATEMENT OF THE CASE

This case involves a judgment of $4,340,000 won by 240 growers of citrus fruit against a commercial packing house licensed by Sunkist Growers, Inc. Sunkist has historically controlled 60 to 80 percent of the lemons and oranges grown in California and Arizona. Sunkist describes itself as a "non-stock, non-profit cooperative marketing association of approximately 7500 California and Arizona citrus growers." Amended Answer of Sunkist Growers, Inc., filed September 2, 1977, In the Matter of Sunkist Growers, Inc., Before the Federal Trade Commission, Docket No. D-9100 at 2. Filed in 1978, this litigation is the first such action in the eighty year history of cooperative marketing in the industry. The judgment obtained by the growers after thirteen days of trial presided over by the late Honorable Walter Early Craig, senior judge of the United States District Court for the District of Arizona, was set aside in its entirety by the United States Court of Appeals for the Ninth Circuit.

A brief resume of the industry is necessary for an informed understanding of this case and its importance to federal and state agricultural law and policy. For many decades, legislators have sought with varying degrees of success to protect both the grower and the consumer from abuses in the marketing of agricultural products. The

agro-economic conditions of the early years of the industry were ruinous to the grower. The grower had to receive a price at least equivalent to his cost of production to survive. The reality, however, was something different:

> [T]he price has usually been determined without reference to cost [of] production and with little thought to the ultimate effect of supply and demand. Usually the grower either sold to a speculative buyer several months before the product was ripe, or took a gambling chance and sold through a commission man. Sometimes the buyers agreed among themselves to fix a maximum price, or to apportion the producing territory; sometimes only one buyer would appear in a given district; and on some occasions there would be no buyer at all.
>
> Selling on commission had its unpleasant features. The marketing hazards were borne by the farmer; he was often entirely dependent upon the integrity of an unknown and distant agent. It was not uncommon for neighboring growers to receive entirely disproportionate returns for the same products; nor was it uncommon for growers to sell their crops far below the cost of production, and it was by no means a rare occurrence when fruit rotted on the trees or was fed to the hogs. Arndt, *The Law of California Co-Operative Marketing Association*, 8 Calif. L. Rev. 281, 282-83 (1920).

This situation didn't do the consumer any good either. Chaos and economic irrationality were intrinsic to this system of individual selling. It was not unusual for purchase contracts to change hands as many as "six or eight times" after the produce had left the fields, each of these hands dipping into the consumer's pocket for a share of the profit. Nor was it unusual for the market to be glutted in one locality with tons of produce wasting in the fields, while in another locality an artificial scarcity of the same kind of produce would exist with prices soar-

ing. The upshot was that: "There was no relation between the amount paid by the consumer and the amount received by the producer, while neither the amount paid or received had any relation to the cost of production." Id.

In the eyes of the early reformers, the fundamental problem was that the grower was a producer, not a marketer, and that he stood alone. The three factors which enter into the distribution of farm produce are packing, shipping, and selling. Id. at 282. But the grower concentrated on production and lacked the specialized training and knowledge, facilities, and capital required to effectively market what he grew. Meyer, *The Law of Co-Operative Marketing*, 15 Calf. L. Rev. 85, 94 (1927). Many thought that the resolution to the "greatest problem of agricultural economics—the problem of marketing agricultural products" was simply to promote cooperative associations of growers. For example, the U.S. Department of Agriculture declared that cooperative organization "is considered to be a primary and fundamental project," U.S. Department of Agriculture, 1914 YEARBOOK at 210, because "[n]o other agency is so powerful in bringing about better farming, better methods of handling the industry, a greater prosperity, and a better group of farmers who are successfully organized to protect and develop their agricultural interests." U.S. Department of Agriculture, 1910 YEARBOOK at 391, 393.

Unfortunately, just as soon as farmers in the early 1900's began to market their produce in a cooperative fashion, many of those who were responsible for or had exploited the opportunities provided by the helplessness of the farmer individually marketing his own produce, sought to capture and prostitute the cooperative form to their own selfish interests. Thus, by 1920 it could be said:

> No general rule can be made for co-operative associations; each must be considered individually. Some

> associations are co-operative in name only; some are owned and controlled by large packing corporations who have hidden their ownership and reaped the benefits of the goodwill acquired by the ostensible co-operative character of their subsidiaries. Other so-called co-operative associations have been merely parts of real-estate schemes to sell orchard land; others have been used by professional promoters to victimize farmers; others have been organized for the benefit of financiers instead of producers; still others have joined hands with the distributors in illegal combinations. Arndt, *Marketing Associations*, supra at 289.

Manifestly, something more had to be done. Major legislative reforms followed at both the federal and state levels. Limiting the benefits of cooperative organization to "only actual producers of agricultural products" was one of the most important aspects of these corrective statutes. Thus, the Copper-Volstead Act, 7 U.S.C. § 291, which clarified and extended the antitrust exemption of the Clayton Act for agricultural cooperatives was quite clear on this point: "The Act states those whose collective activity is privileged under it; that enumeration is limited in quite specific terms to producers of agricultural products." *Case-Swayne Company v. Sunkist Growers, Inc.*, 389 U.S. 384, 393, 88 S.Ct. 528, 533 (1967). And the model cooperative marketing act drafted by Arnold Sapiro, the chief exponent of the so-called "California Plan" for cooperative marketing, sought to limit membership in cooperatives to growers only. *Co-Operative Marketing*, supra at 87. (In California, this act became Chapter 1, of Division 20 of the California Food and Agricultural Code; the legislation under which Sunkist is organized. Amended Answer of Sunkist, supra.)

A recognition of the victimization of the grower by the processors and dealers upon whom he depended to get his fruit from field to market marked another major

aspect of statutory reform. In 1930, Congress enacted the Perishable Agricultural Commodities Act (hereinafter cited as the PACA) to suppress "unfair and fraudulent practices" in a $50 billion industry which was "particularly susceptible to such practices in view of the high perishability of fresh fruits and vegetables." Campbell, *The Perishable Agricultural Commodities Regulatory Program*, Davidson, 1 AGRICULTURAL LAW 321, 322 (1981). As subsequenlty stated in congressional reports:

> The Perishable Agricultural Commodities Act is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. S. Rep. No. 2507, 84th Cong. 2d Sess. 3-4 (1956); H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2 (1955).

The requirements and proscriptions of the PACA and its implementing regulations are most strict and detailed. For example, it is unlawful for commission merchants, dealers, or brokers to use unfair or unreasonable practices in weighing produce, to make false or misleading statements in the receipt or sale of produce, to refuse to correctly account for proceeds of sale, or ultimately to fail to perform any duty arising from an undertaking to handle or sell produce. 7 U.S.C. 499(b).

Growers must be provided with written contracts or statements describing the terms and conditions under which their produce will be processed and marketed. Breaches of these contracts are also violations of the PACA. 7 C.F.R. 46-32(a). Agents are liable to their growers for damages arising from such breaches, 7 C.F.R. § 46-32(a) and for losses caused by their negligence. 7 C.F.R. § 46-32(f).

Commission merchants, dealers, and brokers acting as agents under the PACA are in a fiduciary relationship with their growers and owe them the highest degree of loyalty. Campbell, *Perishable Agricultural Commodities*, supra at 344. Violations of these duties are considered the " 'most serious and flagrant type possible under the act'." Mandell, *Spector, Rudolph Co. v. United States*, 364 F.2d 889, 893 (3rd Cir. 1966).

The PACA has been described as being one of the most successful federal regulatory programs. Unfortunately, the PACA is administered principally by only about eighty-five employees in the U.S. Department of Agriculture. This small number must oversee the activities of 16,000 dealers, commission merchants and brokers engaged in the marketing of perishable agricultural commodities in interstate or foreign commerce. These same employees must respond to about 25,000 requests a year for informal assistance and investigate 3,000 complaints received annually. Campbell, *Perishable Agricultural Commodities*, supra at 324-26.

However, the PACA does not purport to limit growers to the administrative remedies provided under the Act, "but on the contrary leaves them free to sue in any court, state or federal, of competent jurisdiction." Annot., 21 A.L.R. 2d, 840, 843 (1952).

This action arises within the citrus industry in the southwestern United States. Coincidentally, this is where large scale cooperative marketing began. And it began with Sunkist.[1]

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[1] "The co-operative marketing system was first applied on a large scale in California. In 1905, there was organized the California Fruit Growers' Exchange, an association controlling 46 percent of the California citrus fruit crop." Meyer, *Co-Operative Marketing*, supra at 86. The Exchange became Sunkist. Arndt, *Marketing Associations*, supra at 282.

The defendant, Pacific Lighting Land Company, is a holding company that owned Yuma Citrus Company (YCC), a commercial packing house licensed under the PACA. During 1973-78, the plaintiff growers contracted with YCC to pick, prepare, and ship their fruit to market. During each of the years at issue, YCC had complete control of the harvesting, pooling, packing, processing, and marketing of its contracting growers' fruit. Further, YCC collected and disbursed all proceeds from the sale of the fruit of its growers.

In October of 1978, the growers filed suit in state court. Insofar as pertinent herein, the growers alleged: (1) breach of contract, (2) violation of state antitrust laws, and (3) violation of the PACA. YCC removed to federal court under 28 U.S.C. § 1331 based upon the PACA claim.

Trial was held in April, 1984. The growers asserted that YCC had specifically contracted to act as their agent and, further, was denominated a "growers agent" under the PACA.[2] As an agent under the PACA and the law of contracts, YCC owed its principals, the growers, fiduciary duties. The growers presented evidence that YCC violated these duties by committing the following acts of willful disobedience and disloyalty:

> (1) Conversion: Sunkist sent YCC $50.00 in sales proceeds to be distributed to the growers. The growers never received this money because YCC diverted the funds into its own income account and kept them. Further, YCC intercepted and kept $1,300,000 in price refund and patronage rebates it obtained through the purchase of large volumes of supplies

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[2] A " 'Growers' agent' " means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing and furnishing containers, supplies or other services." 7 C.F.R. § 46.2(q). With the exception of planting, YCC performed all of these services.

paid for by the growers and used in the packing of the growers' fruit. These refunds and rebates were obtained by YCC from Fruit Grower's Supply (FGS), a Sunkist nonprofit agricultural cooperative, which like its parent is organized under Chapter 1 of Division 20 of the California Agricultural Code.

(2) Fraud: In violation of state law, YCC charged the growers an exhorbitant amount for packing. The overcharges totalled $120,000. To conceal and retain these charges, YCC deposited the money into a fictitious "contingency fund."

(3) Secret Profits: YCC realized a secret, improper profit of over $655,909.82 in charges assessed against its growers for picking and hauling their fruit. YCC also profited secretly at its growers' expense by doubling its packing charges for certain fruit and manipulating fruit weight figures in order to increase other costs charged to growers.

(4) Pursuit of An Adverse Interest: YCC Accorded preferential treatment to large growers at the expense of smaller growers contracting with YCC. For example, one large grower having only worthless frozen fruit was allowed to participate in sale proceeds, thus skimming money from smaller growers who had contributed marketable fruit. Additionally, YCC also permitted its largest grower, Citibank of New York, to skim money from smaller growers by giving Citibank money for the purported sale of fruit that was never picked. (YCC even charged the smaller growers "costs" for packing the nonexistent fruit.) Also, YCC surreptitiously gave Citibank a contract that guaranteed that in the event there was a loss in the sale of its fruit, it would never be required to pay charges in excess of that loss. This meant that should proceeds from the sale of Citibank's fruit fail to cover the packing costs, the difference would be made up by taking money from the other growers. In summary, YCC deliberately sacrificed the interests of small growers in order to court the business of two of its largest growers.

> (5) Improper Accountings: YCC kept its growers ignorant of these defalcations by failing to properly account to them.

The growers "sought two distinct alternative types of relief. The first was damages for losses to the entire class of growers due to alleged overcharges or the failure of YCC to pay amounts due to the growers. The alternative type of relief was to recover from YCC all of its profits for the five year period." *Johnson*, supra.

With regard to the second measure of damages, the growers argued to the jury that YCC's many deliberate breaches of its fiduciary duties warranted a partial recovery of the compensation they had paid to YCC while it had acted as their agent in handling their fruit. Specifically, they contended that YCC was not entitled to retain the profits it had extracted from its growers, and they sought a recovery of any monies paid to YCC over and above its basic costs of operation.

The growers requested and the court gave the following jury instruction:

> If an agent betrays his principal, such misconduct and breach of his duty of utmost good faith owed towards his principal results in the agent losing his right to compensation for services to which he might otherwise be entitled.

The jury rendered a verdict awarding damages of $3,900,000 on the breach of contract claim and $440,000 on the antitrust claim. The jury also found the defendant liable on the PACA claim but did not award damages (which in any event would have been duplicative of the contract award as under Arizona law the PACA and its implementing rules and regulations are deemed to have been incorporated within the terms and conditions of YCC's grower contracts).

YCC appealed the jury's awards under the breach of contract claim and the antitrust claim. It did not appeal the verdict on the PACA claim.

The United States Court of Appeals for the Ninth Circuit reversed both verdicts. The reversal of the antitrust verdict is not the subject of this Petition. The reversal of the jury's award under the contract claim is.

In arriving at its decision, the Court of Appeals adduced that:

> Although the jury was instructed on both measures of damages, the case was tried and argued to the jury almost entirely on the latter theory. The plaintiffs asked for an award of all of YCC's profits for the five years and it is clear that this was the basis of the jury's award.[3]

In the view of the Ninth Circuit:

> There is no doubt that plaintiffs would be entitled to recover damages suffered as a result of any alleged defects in performance by YCC. The question this court faced is whether the award could be based on all of YCC's profits. The case relied upon by plaintiffs held that an agent is not entitled to compensation when the agent breaches its fiduciary duty to its principal. That case, however, relied on a provision of the Restatement of Agency dealing with a defense that a principal may assert when the agent is suing for compensation. Here, the growers contracted for services in packing and shipping fruit and YCC performed those services. The class may be entitled to a refund of improper charges and the damages they may have suffered from defective performance, but not to a disgorgement of all profits for the entire five year period. *Johnson*, supra.

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[3] The growers strongly dispute this finding on two bases: First, it is factually inaccurate. Second, such divination is beyond the proper scope and purpose of appellate review. However, the growers concede the practical futility of further argument on this point.

REASONS FOR GRANTING THE WRIT

The unifying theme of YCC's defense, which proved so unavailing at trial but spectacularly successful upon appeal, was bottomed upon the distinction that it "ran a commercial (as opposed to a cooperative) for-profit citrus packing house." As such, YCC argued that it was wrong to treat it as a fiduciary owing a duty of utmost good faith. And it was certain error to hold YCC to a fiduciary remedy rather than to the measure of damages for a breach of contract committed within an ordinary commercial context.

But this case presents the classic fiduciary situation. YCC was in exclusive control of its growers' fruit, the monies obtained from the sale of that fruit, and all essential elements of information generated by the harvesting, pooling, packing, processing, and marketing of the fruit entrusted to YCC. The Ninth Circuit's rationale that though a principal may refuse to pay a faithless agent should the agent sue the principal, the principal may not sue to recover the compensation he has already paid a faithless agent, is not supportable in either logic or law.

Other circuit courts of appeal have considered this point, as have federal trial courts and the courts of most of the states within the Ninth Circuit's diversity jurisdiction. The Ninth Circuit's decision is in conflict with every holding of these courts. Moreover, the Ninth Circuit has directly overruled the governing law of the State of Arizona.

Further, the Ninth Circuit Court's decision contravenes federal policy as to cooperative marketing. On the one hand, Congress and the U.S. Department of Agriculture have deemed it necessary to clearly impose a fiduciary status and duties upon a PACA licensee such as YCC. On the other, the Ninth Circuit has eviscerated the most practical remedy available to growers who collectively

have been victimized by the willful violation of these very same fiduciary duties. In essence, the Ninth Circuit has created a specially blessed status for fiduciaries licensed under the PACA. Growers' agents are entitled to retain their compensation, regardless of their breach of trust. No other fiduciary in any field of commerce enjoys this privilege.

Finally, the mindset revealed by YCC's defense and the acceptance of that defense without qualification by the Ninth Circuit emphasizes the necessity of dealing yet once again with what is one of the most intractable problems in modern agriculture: What can and must be done to keep nonproducers from infiltrating and manipulating for pecuniary gain the cooperative organizations of actual producers of agricultural products. What happened with the FGS monies is an excellent illustration of this problem.

Chapter 1, Division 20 of the California Agricultural Code, works in three ways to prevent nonproducers from capturing cooperative organizations. First, those persons forming an agricultural cooperative association must be engaged in the production of farm products. § 54061. Second, an agricultural cooperative association may admit as members only such persons as are engaged in the production of a product which is to be handled by or through the association, or who use or employ any service or facility offered by the association on or in connection with land which is used for the production of an agricultural product. § 54231. Third—and this perhaps is the most important restriction of all—the cooperative associations shall be nonprofit "since they are not organized to make profit for themselves, as such, or for their members as such, but only for their members *as producers.*" § 54033. (Emphasis supplied)

YCC did not produce anything. It was not a grower. YCC's membership in FGS and collection of $1,300,000

in prices refund and patronage rebates intended for its growers was wholly illegal and prohibited under Chapter 1, Division 20 of the California Agricultural Code.

What perhaps is most telling about their situation, however, is that the FGS is the supply affiliate of Sunkist and "The majority of the Board of Directors for Sunkist are also members of the FGS Board of Directors." Sunkist Growers, Inc., 1979 Annual Report, Financial Review, II. Yet those same individuals permitted a commercial packing house to receive and pocket the money that should have gone to YCC's growers. Indeed, this is not the first time that Sunkist has permitted nonproducers to share in the benefits of the "Sunkist system," as a reading of the *Case-Swayne*, decision, supra, will document.

Given the lack of protection afforded to its growers by Sunkist, the Ninth Circuit's suggestion in its opinion that the growers could look to Sunkist to police the activities of its commercial packing house is a small comfort in the first instance and appallingly naive in the second. Clearly judicial intervention is necessary, but hardly the sort of intervention provided by the Ninth Circuit.

I. The Ninth Circuit Has Overruled Governing State Law.

The Supreme Court of Arizona "has consistently held that it will generally follow the Restatement of Law unless a different rule has been pronounced by the court in prior decisions or by legislative enactment." *Irwin v. Murphy*, 91 Ariz. 148, 302 P.2d 534, 537 (1956). This is because that court believes the Restatement is "an authority which the bench and bar of the country regard as the highest." *Lightning Delivery Co. v. Matteson*, 45 Ariz. 92, 99, 39 P.2d 938 (1935). Indeed, Arizona has been criticized as having "the dubious distinction of being the only state expressly to have opened to the door to affording primary precedential authority to the Restate-

ment." Byrne, Jr., *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 Ariz. L. Rev. 1021, 1031 (1973). Suffice to say that Arizona's jurisprudence is marked by a large number of decisions citing the Restatement as authority for the resolution of judicial questions in cases in which there is no controlling Arizona common law or statute. Id. at 1030.

Section 469 of the Restatement of Agency states as follows:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty or loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

This section of the Restatement (Second) was cited by the Arizona Supreme Court in the case of *Haymes v. Rogers*, 70 Ariz. 408, 222 P.2d 789 (1950), in which the court said: "If an agent betrays his principal, such misconduct and breach of duty results in the agent's losing his right to compensation for services to which he would otherwise be entitled."

That same § 469 under comment "e," declares that a principal may maintain an action to recover compensation paid in ignorance of his agent's deliberate disloyalty and disobedience. Comment "e" states as follows:

> If the principal, in ignorance of the agent's faulty conduct, pays to the agent compensation or indemnity to which he is not entitled, the principal can maintain an action to recover the amount.

This application of 469 was recognized in *Roy H. Long Realty Company, Inc. v. Vanderkolk*, 26 Ariz. App. 226, 547 P.2d 497 (1976), a case in which the principal was suing his agent.

Thus, there are two Arizona decisions approving § 469 of the Restatement as law in the State of Arizona: *Haymes* and *Long*. Neither opinion imposes any qualification whatsoever upon the application of § 469 to suits in which principals seek to recover compensation paid to deliberately disobedient or disloyal agents. Section 469 itself clearly does not impose any such qualification. On the contrary, it plainly states that the recovery of compensation paid is an appropriate measure of damages.

The Ninth Circuit's construction of § 469 as being limited to establishing a defense that may be used by a principal when being sued by a faithless agent seeking compensation for services tainted by intentional breaches of fiduciary duty, directly contradicts the controlling rules of decision of the forum state of Arizona and the plain language of the Restatement itself. This is not just bad law, it is not law at all.

YCC's conversion, fraud, secret profits, pursuit of an adverse interest, and failure to account were intentional acts. The growers' measure of the damages under § 469 of the Restatement was and is appropriate. Indeed, the growers could have asked for the recovery of *all* of the compensation paid to YCC instead of simply that compensation which was net profit to the packing house.

II. The Ninth Circuit's Construction of § 469 Directly Contradicts The Decisions of Other Circuits, Federal Trial Courts and State Courts Within The Ninth Circuit's Diversity Jurisdiction and Itself.

Its construction of § 469 in this case places the Ninth Circuit in direct conflict with:

A. The Tenth Circuit Court of Appeals. *Wilshire Oil Co. of Texas v. Riffe*, 406 F.2d 1061 (10th Cir. 1969);

B. The decisions of the federal trial courts which have construed § 469 as providing a measure of damages in suits by principals against unfaithful agents. *Heyman v.*

Kline, 344 F. Supp. 1110 (Conn. 1970), rev'd. on other grounds, 456 F.2d 123 (2nd Cir. 1972), cert. denied, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed.2d 88 (1972); *In Re O.P.M. Leasing Services, Inc.*, 21 B.R. 986 (S.D.N.Y. 1982);

C. The decisions of the courts of Arizona's sister states within the Ninth Circuit's diversity jurisdiction that have construed the application of § 469 to such suits. *J.C. Peacock, Inc. Hasco*, 196 Cal. App. 2d. 353, 16 Cal. Rptr. 518 (1961); *Cooke v. Iverson*, 94 Idaho 929, 500 P.2d 830 (1972); *American Timber and Trading Co. v. Niedermeyer*, 276 Or. 1135, 558 P.2d 1211 (1976); *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wash.2d 658, 648 P.2d 875 (1982);

D. The general rule of which § 469 is but a distillation. "Recovery Back by Employer of Compensation Paid to Employee as Result of Mistake or the Employee's Fraud," 88 ALR2d. 1437. "Principal's Right to Recover Compensation Paid by Him or by Third Person to Unfaithful Agent or Broker," 134 ALR 1346;

E. The decisions of the Courts of Appeal for the Second, Fifth and Sixth Circuits construing the general rule. *Matter of Arlan's Dept. Stores, Inc.*, 615 F.2d 925 (2nd Cir. 1979); *United States v. Bowen*, 290 F.2d 40 (1961 5th Cir.); *Richard v. Bluegrass Mining Co.*, 127 F.2d 291 (6th Cir. 1942);

F. Ironically enough, itself. *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1978).

III. The Ninth Circuit Has Significantly Reduced The Production Given Growers Under The PACA.

Aside from its fiduciary status as a commission merchant under the common law of agency, YCC obtained a license and acted as a growers' agent under the PACA. In short, it voluntarily assumed the fiduciary duties im-

posed by the PACA—duties imposed for the protection of growers.

The growers alleged and proved the same improper acts with the same evidence under both their breach of contract claims and their PACA claim. On the one hand, a violation of a grower's contract is a violation under the PACA; on the other hand, under Arizona law, the PACA became part of these contracts. *Wise v. First Nat. Bank*, 49 Ariz. 146, 65 P.2d 1154 (1937); *Wilson* v. *Calvert*, 96 F. Supp. 597 (Az. 1951). Thus, a violation of the PACA also is a violation of the contract.

From this it follows that an award of damages under both claims would have been duplicative. In closing argument, the growers requested that the jury find in their favor as to both claims, but award damages only under either the PACA claim or the breach of contract claim—not both. This the jury did, choosing to award damages under the contract claim and not under the PACA claim.

The PACA "was designed primarily for the protection of the producers of perishable agricultural products." S. Rep. No. 2507, supra; H.R. Rep. No. 1196, supra. To achieve this protection, Congress made it abundantly clear that licensees under the PACA were fiduciaries, having the duties and liabilities attendant to that status. And though the detailed regulations promulgated under the PACA to govern the conduct of licensees are controlling to the extent they cover a particular matter, the rights and remedies of growers are also defined by the "entire field of contract and sales law." Campbell, *Perishable Agricultural Commodities*, supra at 323, 367. The corpus juris of principal and agent relationships is one of the most important elements of that entire field of law.

Congress never contemplated that the protection conferred by imposing a fiduciary status upon licensees under the PACA would be judicially vitiated by removal

of one of the most important remedies available to a principal: the right to recover the compensation paid to an agent who deliberately and secretly breached the trust reposed in him or her. But this is what the Ninth Circuit has done with its decision in this case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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BEST AVAILABLE

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-2834; 85-1600

NORMAN R. JOHNSON and LOUISE C. JOHNSON, *et al.*,
Plaintiffs-Appellees/
Cross-Appellants,

v.

PACIFIC LIGHTING LAND COMPANY,
Defendant-Appellant/
Cross-Appellee.

D.C. No. CIV 78-877-WEC

Argued and Submitted
December 3, 1985—Phoenix, Arizona

Filed May 18, 1987

Before: James R. Browning, Joseph T. Sneed and Procter Hug, Jr., Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the District of Arizona
Walter E. Craig, District Judge, Presiding

OPINION

HUG, Circuit Judge:

This is a class action by a group of citrus fruit growers against a commercial packing house that picked, hauled, packaged, and shipped the fruit to market. The action is based on three theories: (1) breach of contract; (2) violation of state antitrust laws; and (3) violation of the federal Perishable Agricultural Commodities Act ("PACA"). The case was filed in state court and removed to federal court under 28 U.S.C. § 1331 (1982) based on the claim under the federal statute. The remaining two claims are pendent state claims. The jury rendered a verdict awarding damages of $3,900,000 on the breach of contract claim and $440,000 on the antitrust claim. The jury also found the defendant liable on the PACA claim, but awarded no damages. The defendant's motion for a judgment not withstanding the verdict or, in the alternative, for a new trial, was denied. Defendant appeals from judgment on the verdict of $4,340,000 and the denial of the motion. The plaintiffs appeal the denial of their motion for attorneys' fees to be assessed against the defendant.

Defendant, Pacific Lighting Land Company, is a holding company that owned Yuma Citrus Company ("YCC"), a commercial packing house, during 1973-1978, the years at issue in this case. The plaintiffs were certified to represent a group of 240 citrus fruit growers in the

Yuma, Arizona area that had contracted with YCC to pick, haul, pack, and ship their fruit to market during any of those years.

The issues raised on YCC's appeal are:

(1) Whether the district court should have directed a verdict for YCC on the state antitrust claim;

(2) Whether the district court properly instructed the jury on the measure of damages on the contract claim;

(3) Whether the district court should have directed a verdict for YCC on the question of the plaintiffs' entitlement to rebates from a supplier of packing materials;

(4) Whether it was error to admit hearsay statements from a former manager of YCC; and

(5) Whether the district court properly excluded certain evidence of trade standards and commercial practice.

We reverse and remand for a new trial. Therefore, we do not reach plaintiffs' cross-appeal of the order denying attorneys' fees.

I.

FACTS

In order to understand the issues presented on this appeal, it is necessary to understand the nature of the "Sunkist System," of which the plaintiff class of growers were members. Sunkist Growers, Inc. ("Sunkist") is a nonprofit coooperative marketing association. It is the central marketing agent for the fruit growers and it operates a federated system with local associations and district exchanges, which is designated the "Sunkist System" and utilizes the "Sunkist" trademark.

The local associations of growers in some instances operate cooperative packing houses. In other instances, the growers contract individually with commercial packing houses licensed by Sunkist. The growers represented by the plaintiffs in this case were all growers that contracted with YCC to perform the packing house functions. YCC was licensed as a commercial packing house by Sunkist and operated as a profit-making entity. YCC executed a written license agreement with Sunkist, agreeing to operate for the growers and the Sunkist System. YCC subsequently entered into written contracts with the growers. During the 1973-74 and the 1974-75 seasons, YCC utilized a form contract entitled "Contract to Handle Fruit." During the 1975-76, 1976-77, and 1977-78 seasons, a form contract entitled "Agency Agreement" was utilized. These two contracts, though similar, varied in some respects. These three documents—the license and the two contracts with the growers—are the contracts that YCC allegedly breached.

In support of the antitrust claim, the plaintiffs alleged that YCC conspired with other packing houses in the Yuma area to limit the quantity of lemons harvested and shipped in order to enhance the market price for lemons. The plaintiffs contend that the market price had fallen when the lemons eventually were sold, causing the growers to lose $440,000.

Plaintiffs also contended that YCC wrongfully retained rebates it received from Fruit Growers Supply ("FGS") for packing materials purchased and utilized by YCC in packing and shipping the growers' fruit. FGS is a cooperative, the members of which are local associations that operate packing houses and commercial packing houses licensed by the Sunkist System. FGS sells packing materials, such as crates and cardboard cartons, to packing houses on a nonprofit basis. Assessments are paid by the members to FGS and rebates are made to the packing houses by FGS after its costs are deter-

mined. The plaintiffs contended that they were entitled to the rebates because these were intended for the benefit of the growers.

II.

THE ANTITRUST CLAIM

The growers contended, and the jury found, that YCC had violated the Arizona antitrust statute, Ariz. Rev. Stat. Ann. §§ 44-1401 to -1415 (1967 & Supp. 1986), by conspiring to withhold the growers' fruit from market. YCC argues that the trial judge should have directed a verdict in its favor because, *inter alia*, the growers did not demonstrate any anticompetitive effect or injury and thus failed to state a claim under the Arizona statute. The following facts were brought out at trial.

Because the supply of fruit usually exceeds the demand, fruit is normally marketed under a federal "pro-rate" system, which allows each grower to ship only a certain percentage of his fruit. However, in 1975, a poor harvest, especially in California crops, was predicted and this limitation was lifted, thus allowing each grower to market all of his fruit. The growers claimed that several packing houses, including YCC, agreed to hold back a portion of the fruit available for market in order to maintain a higher price. The growers contend that when the California crop proved to be much larger than expected and prices dropped sharply, the growers' fruit that had not been marketed was sold at a lower price and they suffered a $440,000 loss.

Under section 44-1402 of the Arizona statue, "[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful." Further, section 44-1412 states that "in construing this [statute], the courts may use as a guide interpretations, given by the federal courts to comparable federal antitrust statutes." We review the interpretation

of the Arizona statute *de novo*. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc). We have found no Arizona cases which address the question of antitrust injury posed here; therefore, we refer to federal court decisions in our analysis. *See Three Phoenix Co. v. Pace Industries, Inc.*, 135 Ariz. 113, 659 P.2d 1258, 1260 (1983) (United States Supreme Court Sherman Act decisions used to construe Arizona antitrust statute).

In effect, YCC argues that, although the growers may have suffered a $440,000 loss on their crops, this injury is not "the type that the statute was intended to forestall.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977) (quoting *Wyandotte Transp. Co. Co. v. United States*, 389 U.S. 191, 202 (1967)). *See also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 481-83 (1982); *Exhibitors' Service, Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 578 (9th Cir. 1986); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir.), *cert. denied*, 472 U.S. 1018 (1985).

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)) (empahis in original); *Blue Shield*, 457 U.S. at 482.

Here, the growers' loss did not stem from anticompetitive actions. If the alleged conspiracy had been suc-

cessful, the growers would have *benefitted* from the artifically higher prices for their fruit.[1] The growers sought damages for the profits they would have realized had competition been *reduced*. This is not the type of injury that the statute was intended to forestall. *Blue Shield*, 457 U.S. at 482; *Brunswick*, 429 U.S. at 488; *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689, 692-93 (9th Cir. 1982). Thus, we hold as a matter of law that the growers, by failing to demonstrate antitrust injury, failed to state a claim under the Arizona antitrust statute and that the trial court should have directed a verdict for YCC on this issue.

It is possible that the failure to ship the fruit to market at an earlier time could have amounted to a breach of contract by YCC. However, the claim was not submitted to the jury on that basis. A separate verdict form was submitted to the jury and the $440,000 was awarded because of an antitrust violation.

III.

BREACH OF CONTRACT

Plaintiffs base their contract claim on three documents: (1) YCC's license agreement with Sunkist; (2) YCC's form contract with the growers for the 1973-74 and 1974-75 seasons; and (3) YCC's form contract with the growers for the 1975-76, 1976-77, and 1977-78 seasons.

The license agreement provided that YCC "shall have an agreement with Growers . . . for whom it provides services under [the license] agreement which shall obligate [YCC] to return to such Growers the net proceeds from the marketing of said Growers' fruit by Sunkist . . ., after deduction of [YCC's] costs and agreed reasonable charges."

---

[1] It is the fruit buyers and ultimately the consumers who would have suffered the antitrust injury in this case.

Both of the form contracts with the growers provided that YCC would charge the growers "the current commercial charge" for its services.[2] Either contract could be terminated at the close of any season. Thus, the license requirement that YCC charge the growers its "costs plus agreed reasonable charges" was translated in both of the contracts with the growers as the "current commercial charge" for YCC's services. The reasonableness of the entire charge, both costs and profits, was left to be determined by competitive market conditions. At that time, there were several other competing packing houses with which these growers could have contracted, and the growers were free to change packing houses from season to season.

It is the two forms of agreement between YCC and the growers that are the real contracts in issue, not the license agreement with Sunkist. The license agreement provided the nature of the contract that YCC was to reach with the growers. If Sunkist contended there was a variance, it could have insisted on modification. The license agreement provided that the "Packer (YCC) shall, upon request, furnish to Sunkist or District Exchange a written copy or statement of the substantial terms of its agreement with the Growers for whom it packs fruit pursuant to this license." There is no indication in the record whether this occurred. It is clear that had the growers believed their agreement with YCC did not conform to the license requirements, they could have protested through their representatives in the Sunkist System or insisted on a different contract with YCC. The

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[2] The contract for the first two years provided that YCC harvest and deliver the fruit to the packing house at its cost if the grower desired the service. In the contract for the last three years, the charges for these services were also to be at the "current commercial charge." As a practical matter, this made no difference, since these harvesting and hauling services were performed by a subcontractor, and these subcontractor charges were passed on to the growers.

remedy under the license agreement, if the growers' contracts did not fulfill its requirements, was to compel YCC to enter into a contract with a different formulation of charges. Absent such a protest, the contracts between YCC and the growers must be considered to be a permissible interpretation of the license requirement, particularly since the parties operated under these contracts for five years. Thus it is not the license, but the contracts actually executed between the growers and YCC, that are determinative of the rights of the parties in this law suit.

There were two distinct alternative types of relief sought by the plaintiffs for breach of contract. The first was damages for losses to the entire class of growers due to alleged overcharges or the failure of YCC to pay amounts due to the growers. The alternative type of relief sought was to recover from YCC all of the profits for the five-year period. The theory of this latter requested relief is that YCC had completely failed to carry out its contractual fiduciary duties as an agent. Thus, the growers argued, YCC was entitled to no compensation for its services.

Although the jury was instructed on both measures of damages, the case was tried and argued to the jury almost entirely on the latter theory. The plaintiffs asked for an award of all of YCC's profits for the five years and it is clear that this was the basis of the jury's award.

Plaintiffs contended that there were numerous failings in YCC's performance, some of the major ones being:

> 1. The plan by which the fruit of the growers was pooled for marketing was defective, resulting in an unfair distribution of the proceeds among the growers. A mathematics professor testified that the method was statistically unsound. This, of course, would have resulted in a benefit to some growers and a detriment to others. It would not have benefited YCC or damaged the growers as a class.

2. The method of accounting and reporting to growers was deficient and not in accordance with the federal regulations under the PACA. A government auditor testified concerning the defects for the 1975-76 season. He did not find, however, that this had resulted in any underpayments to growers.

3. YCC allowed one or more growers to enter the pool late in the season one year, after some of their fruit had frozen, resulting in a lesser average price for the fruit and a consequent loss to the other growers in the pool.

4. Rebates from FGS to YCC for packing materials were not passed through to the growers as plaintffs contended they should have been.

5. Contingency charges were not properly accounted for, resulting in overcharges to the growers.

There is no doubt that plaintiffs would be entitled to recover any damages that the class had suffered from such defects in performance. The question is whether the award could be based on all of YCC's profits for the entire five-year period, irrespective of the actual damage to the plaintiff class.

The plaintiffs' contention that the proper measure of damages is the forfeiture of all of the profits of YCC for the five-year period is based on the Arizona case of *Haymes v. Rogers*, 70 Ariz. 408, 222 P.2d 789 (1950). That case involved a real estate broker who sought to recover a real estate commission of $425 for his services in the sale of a piece of real property. The seller defended on the ground that the broker had acted in bad faith in representing him because he had revealed to the buyer that he thought the seller would take $8,500 instead of his asking price of $9,500. The seller eventually sold the property for the $8,500 but refused to pay the commission. The Arizona Supreme Court stated:

> [A] broker or salesman owes the utmost good faith to his principal as does any other person acting as agent or in a fiduciary capacity. If an agent betrays his principal, such misconduct and breach of duty results in the agent's losing his right to compensation for services to which he would otherwise be entitled.

Id. at 790. The court cited as authority Restatement of Agency, section 469. The plaintiffs note that it is well established law in Arizona that in the absence of case law to the contrary, the Restatement will be followed as the proper statement of law. *Green Acres Trust v. London*, 142 Ariz. 12, 688 P.2d 658, 669 (App. 1983), *reversed on other grounds*, 141 Ariz. 609, 688 P.2d 617 (1984).

Section 469 of Restatement (Second) of Agency states:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

This provision of the Restatement (Second) of Agency is in Chapter 14, which deals with the duties and liabilities of the principal to the agent. This particular provision deals with a defense that a principal may assert when the agent is suing for compensation, as was the situation in *Haymes*. Other provisions of the Restatement (Second) of Agency in Chapter 13 deal with the duties and liabilities of the agent to the principal.

Section 400 of the Restatement (Second) of Agency states:

> An agent who commits a breach of his contract with his principal is subject to liability to the principal

> in accordance with the principles stated in the Restatement of Contracts.

Comment (b) states:

> b. *Damages.* In an action for a breach of contract, the agent is subject to liability for harm to the interests of the principal caused by the agent's failure to perform, and also for loss of profits which were reasonably to be anticipated and which would have been made had the promised service been performed.

YCC did perform valuable services for the growers over the five-year period. It harvested, hauled, packed, and shipped the fruit to market. It may have breached its contract in some respects as plaintiffs allege, in which case the plaintiff class is entitled to the damages it proves the breaches actually caused to the class. Furthermore, if the plaintiffs establish that YCC charged more than the contractual rate specified, the "current commercial charge," then the plaintiff class would be entitled to reimbursement for the charges that were in excess of the "current commercial charge."

If an agent makes a secret and unlawful profit, such as the situation in *Thomas v. Newcomb*, 26 Ariz. 47, 221 P. 226 (1923), when the agent told his principal that the cost of land was $2,560 more than it actually was and pocketed the $2,560, then he is required to pay that amount to his principal. It is clear that he must disgorge the entire secret profit, either under a theory of damages or as a constructive trustee for his principal.

An analogous situation occurred in *Edwards v. Hauff*, 140 Ariz. 373, 682 P.2d 1 (App. 1984). In that case, an agent who had been engaged by the principal to manage its property and acquire other investment properties for it, secretly acquired property for himself. He used the principal's funds for a down payment and then sub-

stituted his own. He was held to be a constructive trustee of the property for the principal and was denied compensation for his services in acquiring the property. This is a case in which the agent was secretly dealing for himself in complete disregard of his duty to his principal.

These cases are entirely different from the case at hand. Here, thegrowers contracted for services in packing and shipping fruit. YCC performed those services. The growers contend that they were charged more than the contract charge, that they were due certain rebates, and that the pooling, accounting, and reporting were poorly done. The class may be entitled to a refund of improper charges and the damages they may have suffered from defective performance, but not to a disgorgement of all profits for the entire five-year period.

The instructions to the jury that permitted the award of this measure of damages were in error. The proper measure of damages is the loss the class of growers suffered from any breach of contract by YCC. *See Rio Grande Oil Co. v. Pankey*, 50 Ariz. 529, 73 P.2d 707 (1937).

IV.

FGS REBATE

YCC contends that it was entitled to a directed verdict on the issue of whether the rebates it received from FGS for the purchase of packing supplies should have been passed through to the growers. The contractual arrangements clearly indicate that YCC, as the packing house, was to receive the rebates. This, of course, reduces the cost of the services provided by YCC. The issue is then whether, in light of these reduced costs, the charge made to the growers was in excess of the "current commercial charge." It is quite possible that with the reduced costs resulting from the FGS rebates, the charge to the growers exceeded the "current commercial rate." This is a proper question for the jury to resolve.

V.

WARNER'S STATEMENTS

YCC strenuously argues that it was error for the district judge to allow three witnesses to testify to statements made by Art Warner, a former manager of YCC. It was anticipated that plaintiffs would call Warner as a witness at trial. A week before trial, Warner had a conference with counsel and several other witnesses, preparatory to trial. Warner had suffered a stroke some time before and was in fragile health. The day before trial, he furnished a doctor's certificate that to testify would endanger his health. All parties agree that he was unavailable. His deposition had not been taken. The plaintiffs sought to have several witnesses testify as to his statements at the conference in the attorneys' office. At a motion *in limine* hearing, the district judge entered an order allowing such testimony under Fed. R. Evid. 804(b)(5). This was clearly error. There were no "equivalent circumstantial guarantees of trustworthiness" in this situation as required by the rule. Warner was not under oath, he was responding to questions of his attorney, which would normally elicit favorable responses, and there would be subtle pressures to be in accord with other favorable witnesses present in the attorneys' office.

Plaintiffs assert this was harmless error in light of other statements made by Warner while he was manager and were thus party admissions. We need not make this determination since the case is being reversed on other grounds. However, we note that this is a difficult position to sustain in light of the requirement of 804(b)(5)(B) that the out-of-court statements be "more probative on the point for which [they are] offered than any other evidence which the proponent can procure through reasonable efforts." In any event, these statements of

Warner made in the attorneys' office should not be permitted on retrial.

VI.

OTHER EVIDENCE

YCC contends it was error to exclude evidence of the charges made by other packing houses on the ground it was irrelevant. We need not determine whether it was error to exclude the particular evidence excluded by the district court. Evidence of the charges of other packing houses in the area is certainly relevant to determining the "current commercial rate" under the terms of the contract. It would be necessary to have evidence to establish what the "current commercial rate" was in order to determine whether the grower class had been overcharged.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-2834, 85-1600

NORMAN R. JOHNSON, and LOUISE C. JOHNSON, *et al.*,
Plaintiffs-Appellees/
Cross-Appellants,

vs.

PACIFIC LIGHTING LAND COMPANY,
Defendant-Appellant/
Cross-Appellee.

DC CV 78-0877 WEC

[Filed Sept. 3, 1987]

Appeal from the United States District Court
for the District of Arizona (Phoenix)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded. COSTS TAXED

Filed and entered May 18, 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-2834, 85-1600

NORMAN R. JOHNSON and LOUISE C. JOHNSON, *et al.*,
Plaintiffs-Appellees/
Cross-Appellants,

v.

PACIFIC LIGHTING LAND COMPANY,
Defendant-Appellant/
Cross-Appellee.

D.C. No. CIV 78-877-WEC

[Filed Aug. 21, 1987]

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, SNEED, and HUG Circuit Judges

ORDER

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

Perishable Agricultural Commodities Act:
7 U.S.C. § 499(b)

§ 499b. Unfair Conduct.

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quality of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in intersttae or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail,

without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultaural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce; *Provided*, That any commission merchant, dealer, or broker who has violated this paragraph may, with the consent of the Secretary, admit the violation or violations and pay a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced;

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit resorting and discarding inferior produce.

June 10, 1930, c. 436, 2, 46 Stat. 532; Apr. 13, 1934, c. 120, 2, 3, 48 Stat. 585; June 19, 1936, c. 602, 1, 49 Stat. 1533; Aug. 20, 1937, c. 719, §§ 2-4, 50 Stat. 725, 726; June 29, 1940, c. 456, §§ 3, 4, 54 Stat. 696; Apr. 6, 1942, c. 211, 56 Stat. 200; July 30, 1956, c. 786, §§ 1, 70 Stat. 726; Aug. 10, 1974, Pub.L. 93-369, 88 Stat. 423.

APPENDIX E

Regulations Under The Perishable
Agricultural Commodities Act,
7 C.F.R. § 46.2(q); 7 C.F.R. § 46-32(a);
7 C.F.R. § 46-32(f)

§ 46.2 Definitions

(q) "Growers' agent" means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services.

* * * *

§ 46.32 Duties of growers' agents

(a) *General.* The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent for handling in his usual manner, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date the statement was delivered to the grower, shall be re-

tained in the agent's files. An agent who does not have in his files either writen contracts or a written statement as required herein is failing to prepare and maintain full and complete records as required by the act. *Provided,* That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. A agent who fails to perform any specification or duty, express or implied, is in violation of the act and may be held liable for any damages resulting therefrom and for other penalties provided under the act for such failure.

* * * *

§ 46.32

(f) *Negligence of agent.* A growers' agent may be held liable for any loss or damage resulting to the growers due to his negligence or failure to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions subject to the act.

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APPENDIX F

Chapter 1, Division 20 Of The
California Food and Agricultural Code:

§§ 54033, 54061, and 54231

§ 54033. Nonprofit nature of associations

Associations which are organized pursuant to this chapter are "nonprofit," since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

(State.1967, c. 15.)

* * * *

§ 54061. Persons auuthorized to form association; purposes

Three or more natural persons, a majority of whom are residents of this state, who are engaged in the production of any product, may form an association pursuant to this chapter for the purpose of engaging in any activity in connection with any of the following:

(a) The production, marketing, or selling of the products of its members.

(b) The harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization of any product of its members, or the manufacturing or making of the byproducts of any product of its members.

(c) The manufacturing, selling, or supplying to its members of machinery, equipment or supplies.

(d) The financing of the activities which are specified by this section.

(e) Any one or more of the activities which are specified in this section. (Stats.1967, c. 15.)

* * * *

§ 54231. Qualifications of members or stockholders

Under the terms and conditions which are prescribed in the bylaws adopted by it, an association may admit as members or issue common stock to only such persons as are engaged in the production of any product which is to be handled by or through the association, or that use or employ any service or facility offered by the association on, or in connection with, land which is used for the production of any product, including the lessees and tenants of land which is used for the production of such product and any lessors and landlords that receive as rent all or part of the crop which is raised on the leased premises.

(Stats. 1967, c.15.)